



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

March 30, 2004

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Paul and Mary Iron Cloud
Porcupine Trading Post
P.O. Box 188
Porcupine, SD 57772

Re: In the Matter of Porcupine Trading Post
Docket No. **RCRA-08-2004-0002**
Complaint and Notice of Opportunity for Hearing

Dear Mr. and Mrs. Iron Cloud:

The U.S. Environmental Protection Agency Region 8 ("EPA") is issuing you the enclosed Complaint and Notice of Opportunity for Hearing ("Complaint") for alleged underground storage tank ("UST") violations at the Porcupine Trading Post facility in Porcupine, South Dakota. The Complaint is issued pursuant to section 9006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e.

EPA alleges in the Complaint that you failed to comply with the federal UST regulations codified at 40 C.F.R. part 280, subpart D, for one UST located at the Porcupine Trading Post in violation of RCRA § 9003(c), 42 U.S.C. § 6991(b)(c). Specifically, the Complaint alleges that you failed to provide an adequate release detection method in noncompliance with 40 C.F.R. §§ 280.40(a) and 280.41(a), and failed to ensure proper operation of cathodic protection in noncompliance with 40 C.F.R. § 280.31(b). EPA proposes a total penalty of \$11,656 for the violations alleged.

You have the right to a hearing to contest the factual allegations in the Complaint. If you admit the allegations, or the allegations are found to be true after you have had an opportunity for a hearing, you have the right to contest the penalty proposed in the Complaint. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an Answer set forth in 40 C.F.R. §§ 22.15 and 22.38. If you wish to contest the allegations in the



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Complaint or the penalty proposed in the Complaint, you must file a written Answer within thirty (30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:

Ms. Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

If you do not file an Answer by the applicable deadline, you will have defaulted and each allegation in the Complaint may be deemed to be admitted as true. You will have waived your right to appear in this action for any purpose and will also have waived your right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the Complaint is legally sufficient, the Presiding Officer may then find you liable and assess against you a civil penalty of up to \$11,000 per violation for the alleged violations.

Whether or not you request a hearing, you may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required. A request for an informal conference does not extend the thirty (30) day period for filing your Answer and/or requesting a hearing.

If you have any questions, the most knowledgeable people on my staff regarding this matter are Amy Swanson and Francisca Chambus. Ms. Swanson is in our Legal Enforcement Program and can be reached at (303) 312-6906. Ms. Chambus is in our Underground Storage Tank Program, and can be reached at (303) 312-6782.

We urge your prompt attention to this matter.

Sincerely,

SIGNED

Sharon Kercher, Director
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

Consolidated Rules of Civil Procedure, 40 C.F.R. Part 22
Complaint and Notice of Opportunity for Hearing, with Exhibits 1 and 2

cc: Kim Clausen-Jensen, Oglala Sioux Tribe

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	Docket No. RCRA-08-2004-0002
)	
Mary and Paul Iron Cloud)	
Porcupine Trading Post)	COMPLAINT AND NOTICE OF
BIA Road 27)	OPPORTUNITY FOR HEARING
Porcupine, SD 57551)	
)	
Respondents.)	
_____)	

AUTHORITY

This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by Section 9006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e. The Administrator has properly delegated this authority to the undersigned EPA officials. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules") set forth at 40 C.F.R. part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

1. Subtitle I of RCRA, RCRA §§ 9001 - 9010, 42 U.S.C. §§ 6991 - 6991i, authorizes EPA to regulate the installation and use of "underground storage tanks" which contain "regulated substances."
2. EPA has jurisdiction over this matter pursuant to RCRA § 9006, 42 U.S.C.

§ 6991e.

3. Section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1), authorizes EPA to promulgate regulations setting forth requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment. EPA has promulgated such regulations at 40 C.F.R. part 280, subpart D.

4. Petroleum and any fraction thereof is a regulated substance as defined at RCRA § 9001(2), 42 U.S.C. § 6991(2).

5. EPA is the “implementing agency” as that term is used at 40 C.F.R. § 280.12.

6. Respondents Mary and Paul Iron Cloud are “persons” as defined by section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and “owners” or “operators” within the respective meanings of RCRA §§ 9001(3) and (4), 42 U.S.C. §§ 6991(3) and (4), and 40 C.F.R. § 280.12, of an “underground storage tank system” (“UST” or “tank”) as defined by RCRA § 9001(1), 42 U.S.C. § 6991(10), and 40 C.F.R. § 280.12.

7. Respondents own and operate one 2,000 gallon gasoline STIP3 UST (identified as EPA Facility Id No. 4070001) installed in October 1991, located at the Porcupine Trading Post facility (“facility”), BIA Road 27, Porcupine, South Dakota, within the exterior boundaries of the Pine Ridge Indian Reservation.

8. Respondents’ tank meets the performance standards for new USTs described in 40 C.F.R. § 280.20.

9. Pursuant to 40 C.F.R. § 280.40(a), owners and operators of new and existing UST systems must provide a method, or a combination of methods, of leak detection that: (1) can detect a release from any portion of the tank and the connected underground piping that routinely

contains product; (2) is installed, calibrated, operated, and maintained in accordance with the manufacturer's instructions, including routing maintenance and service checks for operability or running condition; and (3) meets the performance requirements in 40 C.F.R. §§ 280.43 or 280.44.

10. Pursuant to 40 C.F.R. § 280.41(a), tanks must be monitored at least every thirty (30) days for releases using one of the methods listed in § 280.43(d) through (h) except that: (1) owners and operators of USTs that meet the performance standards in 40 C.F.R. §§ 280.20 or 280.21, and the monthly inventory control requirements in 40 C.F.R. § 280.43(a) or (b), may use tank tightness testing at least every five years until December 22, 1998, or until 10 years after the tank is installed or upgraded under 40 C.F.R. § 280.21(b), whichever is later.

11. Pursuant to 40 C.F.R. § 280.31(b), all UST systems equipped with cathodic protection must be inspected for proper operation by a qualified cathodic protection tester within six (6) months of installation and every three (3) years thereafter.

12. Pursuant to 40 C.F.R. 280.45(b), all UST system owners and operators must maintain the results of any sampling, testing, or monitoring for at least one year.

13. EPA notified Respondents in writing on August 8, 2000, that inventory control with tank tightness testing could only be used as a method of leak detection for their tank until October 2001, 10 years from the initial installation date, in accordance with 40 C.F.R. § 280.41.

14. In 1999, the Oglala Sioux Tribe offered at no cost to the Respondents an automatic tank gauging ("ATG") system for conducting leak detection consistent with 40 C.F.R. §§ 280.41 and 280.43.

15. In order to use the ATG for their tank, Respondents were responsible for funding the costs of installation and purchasing a new probe necessary to modify the ATG for a 2000

gallon-capacity tank.

16. The Respondents have not purchased the probe or installed the ATG as of the date of this Complaint.

17. The Respondents were provided advance notice of a planned UST inspection at the facility by Randy Bettellyoun, Oglala Sioux Tribe Environmental Program, at least four working days prior to the inspection. Mrs. Iron Cloud, facility representative, was provided a list of documents that needed to be available on site for the inspection, including but not limited to the last 12-months of leak detection records.

18. On August 26, 2003, EPA inspectors Francisca Chambus, Christopher Guzzetti and Patricia Pfeiffer (“the inspectors”), accompanied by Randy Bettellyoun, Oglala Sioux Tribe Environmental Program, conducted an inspection at the facility to determine compliance with RCRA Subtitle I and the EPA regulations relating to USTs.

19. At the time of the inspection, Mrs. Iron Cloud informed the inspectors that the Respondents continued to use inventory control and tank tightness testing as the leak detection method for the tank.

20. At the time of the inspection, Mrs. Iron Cloud was unable to produce for review any leak detection results for the past year.

21. At the time of the inspection, Ms. Chambus reminded Mrs. Iron Cloud that the regulations prohibited the use of inventory control and tank tightness as the monthly leak detection method for tanks 10-years old and more and that Respondents’ tank had been installed for 10 years as of October 2001.

22. At the conclusion of the inspection, the inspectors informed Mrs. Iron Cloud that

the facility was out of compliance and explained the violations. The inspectors completed a “Notice of Inspection” form which was signed by and left with Mrs. Iron Cloud.

23. Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), states in pertinent part that any owner or operator of an underground storage tank who fails to comply with any requirement or standard promulgated by the Administrator under section 6991b of this title shall be subject to a civil penalty not to exceed \$11,000 for each tank for each day of violation.

24. As alleged herein and pursuant to section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), and 40 C.F.R. § 19.4, Respondents are liable for civil penalties up to \$11,000 per day per tank during which the violation continues, up to a maximum total of \$137,500 for all violations.

Count 1
(Failure to provide adequate release detection method)

25. The Respondents were required to comply with the release detection methods in accordance with 40 C.F.R. § 280.40(a) for the tank.

26. The Respondents were required to comply with the monthly release detection methods in accordance with 40 C.F.R. § 280.41(a) for the tank.

27. Respondents failed to maintain monthly leak detection results for the tank for one year in accordance with 40 C.F.R. § 280.40(a).

28. Pursuant to 40 C.F.R. § 280.41(a), inventory control with tank tightness testing was no longer adequate release detection for tanks meeting the performance standards in 40 C.F.R. §§ 280.20 or 280.21, and the monthly inventory control requirements in 40 C.F.R. § 280.43(a) or (b), after December 22, 1998, or until 10 years after the tank was installed or upgraded under 40 C.F.R. § 280.21(b), whichever is later.

29. Respondents' tank's 10-year anniversary from the date of installation was October 2001.

30. Inventory control with tank tightness testing was not an adequate method of release detection for Respondents' tank after October 2001.

31. Respondent failed to perform adequate monthly release detection on the tank after October 2001 because Respondent continued to use inventory control with tank tightness testing as the release detection method.

32. Respondents' failure to perform adequate release detection on the tank and maintain monthly leak detection results for one year constitutes separate violations of RCRA § 9003(c), 42 U.S.C. § 6991b(c), and 40 C.F.R. §§ 280.40(a) and 280.41(a), beginning November 2001 and continuing.

Count 2
(Failure to ensure proper operation of cathodic protection)

33. The tank was required to comply with the cathodic protection testing requirements in accordance 40 C.F.R. § 280.31(b).

34. Pursuant to 40 C.F.R. § 280.31(b), Respondents were required to test the tank for cathodic protection by a qualified cathodic protection tester three years after the last test.

35. Respondents last tested the tank for cathodic protection on July 22, 1999.

36. Respondents failed to ensure proper operation of cathodic protection because it failed to test the tank for cathodic on or before July 22, 1999, or any time subsequent.

37. Respondents' failure to ensure proper operation of the tank's cathodic protection constitutes a violation of RCRA § 9003(c), 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.31(b), beginning July 22, 2002, and continuing.

PROPOSED CIVIL PENALTY

RCRA § 9006(d)(2)(C), 42 U.S.C. § 6991e(d)(2)(C), authorizes the assessment of a civil penalty of up to \$11,000 for each UST for each day of violation. Based upon the facts alleged in this Complaint and taking into account the factors prescribed by statute, i.e., the seriousness of the violations and any good faith efforts by Respondents to comply with the applicable requirements, Complainant proposes to assess a civil penalty of \$11,656.00 as follows:

<u>COUNT</u>	<u>VIOLATION</u>	<u>PROPOSED PENALTY</u>
Count 1	Failure to provide adequate release detection method, 40 C.F.R. §§ 280.40(a) and 280.41(a)	\$11,042
Count 2	Failure to ensure proper operation of cathodic protection, 40 C.F.R. §280.31(b)	\$614

TOTAL PROPOSED PENALTY: \$11,656.00

The proposed civil administrative penalty above has been calculated in accordance with the U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990) (Exhibit 1). This policy is used by EPA to provide a rational and consistent application of the statutory factors to the facts and circumstances of a specific case. The Penalty Calculation Worksheets for the alleged RCRA UST violation in support of the assessment of civil penalties proposed in this Complaint are attached hereto (Exhibit 2).

TERMS OF PAYMENT

If Respondent does not contest the findings and penalty proposal set forth above, this action may be resolved by paying the proposed penalty in full. If such payment is made within thirty (30) calendar days of receipt of this Complaint, then no Answer need be filed. For more time for payment, Respondent may file a statement agreeing to pay the penalty within thirty (30) days of receipt of the Complaint, then pay the money within sixty (60) days of such receipt. Payment is to be made by sending a certified or cashier's check payable to "Treasurer, United

States of America," to:

EPA Region 8
(Regional Hearing Clerk)
Mellon Bank
P.O. Box 360859M
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to:

Amy Swanson, Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8 (8ENF-L)
999 - 18th Street, Suite 300
Denver, Colorado 80202-2466

Payment of the penalty in this manner shall constitute consent by Respondents to the assessment of the proposed penalty and a waiver of Respondents' right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in RCRA § 9006(b), 42 U.S.C. § 6991e(b), a respondent has the right to request a public hearing within thirty (30) calendar days after this Complaint is served. If you (1) contest the factual claims made in this Complaint; (2) wish to contest the appropriateness of the proposed penalty; or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with 40 C.F.R §§ 22.15 and 22.37 within thirty (30) calendar days after this Complaint is received.

Your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) state all facts and circumstances, if any, which constitute grounds for defense; (3) state the facts intended to be placed at issue; and (4) specifically request an administrative hearing, if desired. The denial of any material fact or the raising of any affirmative defense in your Answer shall be construed as a request for a hearing.

Failure to deny any of the factual allegations in this Complaint constitutes an admission of the undenied allegations.

The answer and one copy must be sent to the EPA Region 8 Regional Hearing Clerk (8RC), 999 - 18th Street, Suite 300, Denver, Colorado 80202-2466, and a copy must be sent to the enforcement attorney listed below.

IF YOU FAIL TO REQUEST A HEARING, YOU MAY WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

SETTLEMENT CONFERENCE

EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set forth above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in 40 C.F.R. Part 22. If a settlement can be reached, its terms shall be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the regional judicial officer. A request for a settlement conference or any questions that you may have regarding this Complaint should be directed to the attorney listed below.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

Date: 8 March 2004

By: David J. Janik
Michael T. Risner, Director
David J. Janik, Supervisory Attorney
Legal Enforcement Program

Date: 3/16/04

By: SIGNED
Sharon L. Kercher, Director
Technical Enforcement Program

Date: 3/30/04

By: SIGNED
Amy Swanson, Enforcement Attorney
U.S. EPA, Region 8
999 18th Street, Suite 300 (8ENF-L)
Denver, CO 80202-2466
Colorado Atty. Reg. No. 26488
Telephone: 303/312-6906
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits 1 and 2 were hand-carried to the Regional Hearing Clerk, EPA, Region 8, 999 18th Street, Denver, Colorado, and that a true copy of the same was mailed by certified mail to:

Paul and Mary Iron Cloud
Porcupine Trading Post
P.O. Box 188
Porcupine, SD 57772

3/30/04
Date

Judith M. McTernan
Signature

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON MARCH 30, 2004.

